(15) (15)

Nos. 96-843, 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondent.

CREDIT UNION NATIONAL ASSOCIATION, ET AL.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

LOUIS R. COHEN
Counsel of Record
MICHAEL S. HELFER
CHRISTOPHER R. LIPSETT
LEON B. GREENFIELD
DAVID H. TOPOL
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Of Counsel
JOHN J. GILL III
MICHAEL F. CROTTY
American Bankers Association
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5026

JULY 11, 1997

61 pp

QUESTIONS PRESENTED

1. Whether banks that compete for customers against federal credit unions, and the banks' trade association, have standing to challenge decisions of the National Credit Union Administration permitting federal credit unions to expand their fields of membership in violation of the "common bond" requirement of the Federal Credit Union Act, 12 U.S.C. § 1759.

2. Whether the "common bond" requirement is violated when an "occupational" federal credit union accepts members who have no "common bond of occupation" with the existing membership.

PARTIES TO THE PROCEEDINGS

The appellees in the court of appeals were the National Credit Union Administration; AT&T Family Federal Credit Union; and the Credit Union National Association.

The appellants in the court of appeals were First National Bank and Trust Company; Lexington State Bank; Piedmont State Bank; Randolph Bank and Trust Company; Bankers Trust of North Carolina (which had previously merged into Triad Bank, a state chartered bank headquartered in Greensboro, North Carolina, which is the successor in interest to Bankers Trust of North Carolina); and the American Bankers Association.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

LEGISLATIVE MATERIALS

MISCELLANEOUS

Nos. 96-843, 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondent.

CREDIT UNION NATIONAL ASSOCIATION, ET AL.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT

This case concerns the meaning of Section 109 of the Federal Credit Union Act, 12 U.S.C. § 1759. Section 109 limits membership in federal credit unions to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."

For nearly fifty years, the National Credit Union Administration ("NCUA") and predecessor agencies

interpreted the "common bond" limitation in Section 109 to mean that all members of any one federal credit union must share a *single* "common bond." In 1982, however, NCUA adopted a new policy in the case of "occupational" federal credit unions. It allowed occupational credit unions to have a "field of membership" comprised of an unlimited number of unrelated occupational groups. NCUA Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982) and IRPS 82-3, 47 Fed. Reg. 26,808 (1982). Pursuant to its new policy, NCUA permitted the AT&T Family Federal Credit Union ("ATTF") to add more than 150 unrelated occupational groups across the nation, so that members of ATTF concededly do *not* share a single common bond of occupation. NCUA has permitted similar expansions by other federal credit unions.

Respondents—banks who compete with ATTF, and a national trade association of banks—filed this suit against NCUA in 1990, alleging that NCUA's policy and its approval of ATTF's expansions violated the common bond requirement. In 1993, the court of appeals held that respondents had standing to bring the suit. Pet. App. 15a,[1] *cert. denied sub. nom. AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993). In 1996, the court of appeals ruled in favor of Respondents on the merits. Pet. App. 1a. The case is here on petitions for *certiorari* by NCUA and intervenors ATTF and the Credit Union National Association ("CUNA," a credit union trade association).

A. Factual and Regulatory Background

Federal credit unions are mutually owned financial institutions chartered and regulated by NCUA pursuant to the Federal Credit Union Act. They are authorized to provide a broad range of ordinary banking services, including deposit

[1] All citations to "Pet. App." refer to NCUA Pet. No. 96-843.

accounts (technically, the sale of "shares"), checking-account-like services, and common sorts of consumer loans and mortgages. Credit union services are generally limited to members, who must qualify for membership under the "common bond" limitation (in the case of "occupational" or "associational" credit unions) or the geographic limitations (in the case of "community" credit unions) of Section 109. Federal credit unions compete for customers ("members") with banks and thrift institutions, state-chartered credit unions, and other financial institutions such as loan companies.

Federal credit unions have been accorded by Congress a number of competitive advantages as compared with other federally chartered financial institutions, on account of their character as mutual benefit institutions restricted to a limited membership.[2] For example, federal credit unions, unlike banks and thrifts (including mutual thrift institutions), are exempt from state and federal taxes, 12 U.S.C. § 1768, and federal credit unions are exempt from a variety of regulatory requirements applicable to banks and thrifts such as the Community Reinvestment Act, 12 U.S.C. § 2902.

Congress adopted the Federal Credit Union Act ("FCUA") in 1934, Pub. L. No. 467, 48 Stat. 1216 (codified at 12 U.S.C. § 1751 *et. seq.*), against a background of State credit union initiatives and Congress's adoption of the District of Columbia Credit Union Act in 1932, Pub. L. No. 190, 47 Stat. 326. The stated general purpose was to provide a federal charter and federal supervision for institutions "typical" of those being formed under State charter, S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934), without "any new form of practice or procedure," 77 Cong. Rec. 3206 (1933) (Sen. Sheppard). Congress's understanding of the existing models for credit

[2] Credit union members generally have "well above average income," and are more likely to own a home and be employed than are others in the population at large. General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness* ("GAO Study") 224 (1991).

union organization was based largely on the work of Roy Bergengren, a pioneer of the credit union movement, principal draftsman of the model credit union statute on which the 1934 Act was based, and the sole witness during the Senate hearings.[3] During the debate over the 1932 District of Columbia Credit Union Act, Congress considered competitive concerns raised by the commercial banking industry, since the credit unions would be operating under a more favorable structure, and it made various changes to the proposed legislation in response. *See* 75 Cong. Rec. 5738 (remarks of Sen. Dickinson); 5964 (remarks of Sens. Dickinson and Blaine); 7889 (voting on amendments) (1932). Competitive concerns were likewise raised and resolved in connection with consideration of the Federal Credit Union Act. *See, e.g., Credit Unions: Hearing Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 20 (1933) ("1933 Hearing") 20; 78 Cong. Rec. 12224 (remarks of Rep. Luce) (1934).[4]

From the outset, Congress's model of federally chartered credit unions included the "common bond" restriction on membership as a key element. As Bergengren said in his testimony during the Senate hearing: "every credit union is organized within a limited and given group of people. And it may have to do only with the members of that group. . . . Therefore a credit union first, as I have said, is a bank which is organized within a specific group of people." 1933 Hearing at 15. In general, Bergengren was of the view that the common bond was vital to the sound functioning of a credit union because the link among members enabled the credit

---

[3] *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking & Currency*, 73d Cong., 1st Sess. (1933).

[4] Administration of the Federal Credit Union Act was initially entrusted to the Farm Credit Administration, and then to a succession of three other agencies, before being transferred to NCUA in 1970. Act of Mar. 10, 1970, Pub. L. No. 206, §6, 84 Stat. 49.

union to have the knowledge necessary to "loan on character" to any member and the constant presence necessary to be effective in collecting such loans. Id. at 26. The common bond limitation on membership was included as Section 9 of the Bill initially proposed, S. 1639, 73d Cong., 1st Sess. (1932), and was enacted as Section 109 of the FCUA without substantive change.[5]

Congress has never altered Section 109's common bond limitation on occupational credit union membership. In 1968 and in 1977, Congress amended the Act to add the provisions, currently codified at 12 U.S.C. §§ 1757(13) and (14), allowing a healthy federal credit union to purchase loans and other accounts of a troubled credit union whose members did not share a common bond with the members of the healthy credit union, Pub. L. No. 375, § 1(3), 82 Stat. 284 (1968); Pub. L. No. 22, § 303(e), 91 Stat. 49 (1977) (codified at 12 U.S.C. § 1757(14)), but Congress specifically noted that these changes were *not* to be "interpreted as a means for the merger of credit unions with dissimilar common bonds"[6] and that the purchasing "credit union could not extend additional financing to the borrower unless he was within the common bond of the

---

[5] Apart from the expressed intent of Congress to authorize only credit unions that were "typical" of those then known, and the implications of the statute itself, Congress "did not . . . express the reason for the [common bond] requirement," GAO Study at 217. NCUA has suggested that Congress's main purpose for the common bond was that it would be easier for organizers to gather people to start up a credit union if the group was already defined by some kind of common bond. *E.g.*, NCUA Br. 7. Congress never said so. Moreover, the argument does not explain why Congress insisted on the common bond as an *absolute limitation* on membership, or why Congress insisted that the common bond limit apply throughout the life of the credit union and not merely to the organizing period. In fact, the statute's limitations on credit union membership constitute the one area explicitly withdrawn from rulemaking authority.

[6] H.R. Rep. No. 23, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 116.

purchasing credit union."[7] Later, in 1982, Congress authorized the emergency merger of insured credit unions that had different common bonds, but only upon a determination by NCUA that a credit union was failing, that an emergency required expeditious supervisory action, and that no other alternative was reasonably available. *See* 12 U.S.C. § 1785(h). Congress authorized supervisory mergers under this provision in response to a specific request for legislation from NCUA, whose Chairman testified that, without it, "[w]e can't combine credit unions with unlike fields of membership."[8] Congress has not authorized mergers of federal credit unions with unlike fields of membership in any other circumstances.

Each of the four predecessors to NCUA, and NCUA itself for twelve years, understood the common bond limitation in Section 109 to require that all members of an occupational credit union share a single common bond—in general, that they all be associated with the same firm (or related firms).[9] In 1982, NCUA announced a new membership policy, the policy challenged in this suit, providing that an occupational credit union may have a field of membership composed of an unlimited number of unrelated employer groups so long as each separate group within the credit union has a "common bond" of its own that separates it both from the public at large and from the rest of the credit union's membership. IRPS

---

[7] S. Rep. No. 1265, 90th Cong., 2d Sess (1968), *reprinted in* 1968 U.S.C.C.A.N. 2469, 2471.

[8] *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. Pt. I, at 109 (1981) (statement of Chairman Connell).

[9] Pet. App. 3a. For some time NCUA has taken the position that employees of firms all located in the same building, industrial park, or shopping center may join together in a credit union on the ground that they share a single common bond. *See* NCUA, *Organizing a Federal Credit Union* 3 (Sept. 1972); 45 Fed. Reg. 8285 (1980).

82-1, 47 Fed. Reg. 16,775, IRPS 82-3 Fed. Reg. 26,808 (1982). *See* IRPS 94-1, 59 Fed. Reg. 29,066, 29,075-76 (1994). No explanation of the legal basis for this new policy was released at the time. In 1983, in a letter to the Chairman of the House Banking Committee, NCUA's Chairman formally advised Congress of the new policy, and justified it on two grounds. J.A. 43-45. First, NCUA stated, although without citation to authority, that it "did not appear to be the intent behind the Federal Credit Union Act" to deny credit union membership to groups that were too small to support a credit union on their own. Second, NCUA stated that multiple-employer credit unions were necessary to deal with cases in "hard economic times" in which "[c]redit unions that served only one employer or one industry could be forced into liquidation." *Id.* at 44. NCUA's explanation did not refer to the 1982 amendments to the Act made by Congress, at NCUA's request and upon its view that it lacked statutory authority to "combine credit union with unlike fields of membership," to deal with credit union liquidations and mergers of failing credit unions.

One credit union that exploited NCUA's new policy was the AT&T Family Federal Credit Union in North Carolina. ATTF was chartered in 1952 with a field of membership limited to "Employees of the Radio Shops of Western Electric Company, Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate families; and organizations of such persons." Charter No. 7840, Radio Shops Federal Credit Union (original charter of ATTF). After NCUA revised its membership policy in 1982, it approved a series of expansions to ATTF's field of membership to add employees of a Coca-Cola bottler, a Pepsi-Cola bottler, Black & Decker Corp., Duke Power Co., the American Tobacco Co., and a large number of other firms. By the time the court of appeals addressed the merits here, ATTF had "grown to have 112,000

members in more than 150 disparate occupational groups spread across all 50 states." Pet. App. 4a-5a. Approximately 65% of ATTF's members today are not employees of AT&T or affiliates. NCUA Br. 9. Under NCUA's policy, ATTF is eligible to add an unlimited number of additional unrelated occupational groups throughout the country to its membership.[10]

B. Proceedings Below

Respondents are four North Carolina banks and the American Bankers Association, the principal national trade association for the banking industry. In 1990, respondents filed suit against NCUA in the U.S. District Court for the District of Columbia, alleging that the multiple-common-bond policy violates the FCUA, and asking, among other things, for relief against NCUA approvals of ATTF's additions of new employer groups. The complaint alleged that the individual bank plaintiffs, and members of the Association, were injured by the operation of NCUA's policy. ATTF and CUNA, its trade association, were permitted to intervene.

In 1991, the district court dismissed, ruling that, although Respondents had constitutional standing, they lacked "prudential standing." Pet. App. 32a-42a. The court of appeals reversed. It agreed that there was no issue of constitutional standing ("that [plaintiffs] will suffer competitive or economic injury is not in doubt," *id.* at 20a), and it held that respondents satisfied the requirements for prudential standing as well. Id. at 15a-31a.

The court of appeals' decision on standing noted that the common bond limitation is a congressionally imposed limit on credit union activity: "Like more classic entry restrictions,

---

[10] ATTF's current authorized membership, which includes groups added even after the court of appeals decision below, and appears now to include many more than 150 constituent groups, is set forth at J.A. 54-78.

the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market." Id. at 24a-25a. The court of appeals then held that, under this Court's precedents, competitors have standing to enforce such a limit. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); and *Association of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 150 (1970). The court of appeals read these cases as standing for "the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions." Pet. App. 24a. In reaching this conclusion, the court of appeals specifically noted that this Court allowed securities dealers or their trade association to enforce competitive restrictions imposed on banks by the Glass-Steagall Act and the McFadden Act, even though those statutes were not meant "to insulate investment bankers . . . from competition." Pet. App. 23a, *citing Clarke*, 479 U.S. at 398 & n.13; and *ICI*, 401 U.S. at 618-19.

On remand, on cross-motions for summary judgment on the merits, the district court upheld NCUA's policy on the common bond limitation as "reasonable." Pet. App. 54a. The court of appeals again reversed the district court, unanimously holding that the common bond provision requires that all the members of any one federal credit union must have a single common bond. This construction, the court found, is required by the text of the statute strictly limiting credit union membership to "a common bond" (which NCUA's interpretation "would drain . . . of all meaning") and the Act's purpose "to unite credit union members in a cooperative venture." Id. at 10a, 12a (brackets and citations omitted). The court of appeals' opinion paid particular attention to the relationship between the "common bond" clause ("credit union membership shall be limited to groups having a common

bond of occupation") and the functionally parallel "community" clause ("or to groups within a well-defined neighborhood, community, or rural district") whose membership NCUA agreed is limited to a single community. The court of appeals reasoned that the two parallel clauses should be read consistently: thus, credit unions of either kind may include more than one group, but all of the constituent groups within a single credit union must have a single common bond of occupation or be within a single geographic community. The court accordingly found NCUA's construction, under which a single occupational credit union could serve an unlimited number of employer groups with disparate occupational bonds, to be impermissible. Id. at 14a.

While a substantially identical case was pending before the Sixth Circuit, this Court granted certiorari. Then, in April 1997, a divided panel of the Sixth Circuit rendered a decision in that case. *First City Bank v. NCUA*, 111 F.3d 433 (6th Cir.), *petition for cert. filed* (No. 96-2018) (June 23, 1997). In accord with the D.C. Circuit, the Sixth Circuit also held that NCUA's policy was unlawful, largely persuaded by the parallel between occupational "common bond" credit unions and "community" credit unions, and the recognition that "if NCUA's interpretation is accepted, it would make the common bond requirement meaningless." *Id.* at 438-49.

SUMMARY OF ARGUMENT

Standing. Respondents compete with credit unions for customers who need deposit, loan, and other financial services. Banks are injured when, as here, NCUA authorizes a credit union to sign up customers ("members") in violation of the statutory limitations on a credit union's "field of membership"—here the statutory requirement that all members of an occupational credit union share a single common bond. As the D.C. Circuit and the Sixth Circuit have held, the competitive injury suffered by banks means that they

are "aggrieved by agency action within the meaning of a relevant statute" under Section 10 of the Administrative Procedure Act, and therefore have standing to challenge the NCUA action.

This conclusion flows from a long series of competitor standing decisions by this Court. *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) is typical. Securities firms were permitted in *Clarke* to sue the Comptroller of the Currency to challenge his decision permitting a national bank to operate discount brokerage offices at places where the bank could not establish a branch. The securities firms claimed that the Comptroller's actions violated the McFadden Act, which limits the branching powers of national banks. This Court held that the securities firms had standing because they were "competitors who allege an injury that implicates the policies" of the McFadden Act's limitations on national banks. *Id.* at 403. Precisely the same thing is true here: Respondents are competitors of the credit unions who allege an injury that implicates the policies of the FCUA's common bond limitation. Indeed, the Chairman of NCUA in 1981 described the common bond limitation as "our McFadden Act."[11]

These competitor standing cases reflect, among other things, the fact that Congress over the past 60 years has for a variety of reasons segmented the market for financial services, granting certain powers and imposing certain restrictions on different kinds of financial institutions. Commercial banks have broad deposit-taking and lending authority, and their customers are protected by federal deposit insurance, but they cannot underwrite corporate securities; securities firms have unlimited securities powers but cannot take deposits; thrifts are encouraged by tax and other laws to make mortgage loans for residential housing; credit unions do not pay federal taxes and are not covered by the Community Reinvestment Act or

---

[11] 1981 Hearings at 109 (Statement of Chairman Connell).

certain other laws, but the membership of a credit union is limited by the common bond requirement.

NCUA makes a fundamental challenge to the competitor standing cases by proposing that this Court hold that only those for whose specific benefit the statute at issue was passed (here, NCUA would say, credit unions themselves) have standing. This is wrong in fact and wrong in principle. NCUA is wrong in fact in asserting that Congress was not concerned with the competitive impact on banks when it passed the FCUA in 1934. For example, in hearings on the predecessor of the FCUA, the 1932 District of Columbia Credit Union Act, the competitive concerns of banks were aired and changes responsive to these concerns were made in the D.C. legislation; these changes were carried forward to the FCUA. NCUA is wrong in principle because major legislative acts are invariably the product of multiple purposes and competing interests. *See Bennett v. Spear*, 117 S. Ct. 1154, 1167 (1997). Of course, one purpose of the FCUA was to promote credit unions, but its very text ("except that Federal credit union membership shall be limited" by the common bond requirement) shows that Congress had in mind other purposes too, including specific limitations on credit union expansion. Given the multiplicity of purposes, it makes no sense to say that only credit unions can sue NCUA to enforce the FCUA. *Clarke* itself held that "there need be no indication of congressional purpose to benefit the would-be plaintiff," 479 U.S. at 399-400; if there were such a requirement, *Clarke* and other cases would certainly have come out the other way, because the notion that Congress passed the McFadden Act or the Glass-Steagall Act specifically to benefit the securities industry is absurd.

The Merits. As both courts of appeals that considered the issue have held, Congress has spoken directly to the precise question presented here, and has required that the members of an occupational credit union share a single common bond.

That conclusion flows from any common-sense review of the text, purpose, and legislative history of Section 109 of the FCUA.

Section 109 begins with a general delegation of authority to NCUA to adopt rules governing membership in a federal credit union, and then specifically limits NCUA's authority with an "except" clause:

> ...except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within an well-defined neighborhood, community, or rural district.

12 U.S.C. § 1759. It is hard to imagine why Congress "limited" federal credit union membership in this way if it did not intend that the members of each occupational credit union had to share a single common bond. The contrary interpretation—the one now advanced by NCUA—reads the common bond limitation out of the statute, for it permits a single credit union to serve all employed persons in the United States simply by listing all their employers, one after another. ATTF is well down that road, with more than 150 disparate occupational groups and members in all 50 states. Pet. App. 4a-5a.

The legislative history is entirely in accord with the text of the statute. NCUA cites nothing showing that Congress intended that a single credit union could string together multiple common bonds. To the contrary, the Senate Report on the FCUA described a credit union as "a cooperative society...limited in each case to the members of a specific group with a common bond of occupation or association...." S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). In this it echoed the testimony of Roy Bergengren, the preeminent credit union crusader, who told the Senate Banking Committee that "a credit union first ... is a bank which is organized within a specific group of people" which may be large, but

which is "confined to the employees" of a single company. 1933 Hearing at 15.

For fifty years, NCUA and its predecessors were of the view that Section 109 required the members of an occupational credit union to share a single common bond. On precisely this ground NCUA in 1982 sought and obtained from Congress an amendment to the FCUA permitting it to approve the merger of a failing credit union into a healthy credit union notwithstanding the common bond limitation. NCUA told Congress it needed the amendment because the common bond limitation meant that "We can't combine credit unions with unlike fields of membership." *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. Pt. I, at 109 (1981) ("1981 Hearings") (Statement of Chairman Connell). Congress passed the amendment *limited to failing credit unions*. NCUA cannot square this history with its position in this case.

NCUA bases its argument principally on the word "groups" in Section 109 (membership is "limited to groups having a common bond of occupation"), contending either that the "s" in "groups" means that Congress authorized credit unions with multiple common bonds, or that the "s" creates an ambiguity on the issue. The courts of appeals rejected this assertion in light of the clear expression of congressional intent and the fact that, as NCUA agrees, members of a credit union can share a single common bond of occupation, even if they might be said to comprise different groups (for example, enlisted personnel, officers, and civilians employed at a military base; employees of a parent company and those of its subsidiaries). In addition, NCUA's reliance on the word "groups" in the occupational credit union clause of Section 109 is undermined by its own interpretation of the word "groups" in the community credit union clause, which limits membership in community credit unions to "groups within a

well-defined neighborhood, community, or rural district." NCUA has always conceded, as it must, that the word "groups" in the community credit union clause does not allow it to roll one community after another into a single, nationwide credit union. As both courts of appeals held, the same must be true for an occupational credit union governed by the functionally parallel clause—and no amount of discussion of participial and prepositional phrases can change that conclusion.

At bottom, NCUA struggles to find ambiguity (and thus deference) in a statute that is plain. If NCUA is right as a matter of policy that marketplace and technological developments render the common bond requirement inappropriate, it needs new legislation, just as the Federal Reserve needed legislation when it tried, for what it considered sound policy reasons, to apply its rules to nonbank-banks in the *Dimension* case. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

ARGUMENT

I. RESPONDENTS HAVE STANDING TO CHALLENGE NCUA'S APPLICATION OF THE COMMON BOND REQUIREMENT.

A. Under Well-Established Principles, Competitors Have Standing to Challenge Federal Agency Decisions Authorizing Financial Institutions To Expand Beyond Their Prescribed Market.

Section 109's limitations on credit union membership constitute the principal line drawn by Congress prescribing the universe in which credit unions may provide services in competition with commercial banks. Within these limits Congress also imposed further restrictions, such as those on the particular services that credit unions may offer to

customers. *See generally* 12 U.S.C. § 1757. But the limitation on membership is the principal restriction because it affects all credit union services: credit unions are generally forbidden to offer any banking services to persons other than members. These limits on credit union activities are part of the federal government's systematic organization and regulation of the financial markets.

Respondents' standing to challenge NCUA's action authorizing ATTF to breach this statutory restriction is governed by Section 10 of the APA, which grants standing to any person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA's "generous review provisions," require only that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *ADAPSO v. Camp*, 397 U.S. 150, 156, 153 (1970), *quoted in Clarke v. Securities Industry Association*, 479 U.S. 388, 395 (1987). The zone of interests test is "not meant to be especially demanding." *Clarke*, 479 U.S. at 399.

The court of appeals held that Respondents have standing to challenge NCUA's approval of ATTF's providing services to persons who do not share its original common bond of occupation, on the basis of this Court's decisions in cases such as *ADAPSO*, *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("*ICI*"), and *Clarke*. Those cases held that the limits Congress placed around banks' lawful activities gave securities firms and other financial institutions standing to challenge the federal bank regulators' approvals for banks to provide services allegedly in violation of those limits. As the court of appeals put it, "We take from [the *ADAPSO-Clarke* line of] cases the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the

alleged loosening of those restrictions. . . ." Pet. App. 24a. This Court has routinely decided many comparable challenges to agency action involving the financial services industry without any apparent qualms about standing,[12] and the continuing vitality of these competitor standing decisions has been repeatedly confirmed, *see, e.g., Bennett v. Spear*, 117 S. Ct. 1154 (1997). Since announcing the "zone of interests" test in *ADAPSO*, this Court has never denied standing to a competitor challenge of this kind.[13]

In *Clarke*, for example, a trade association of securities dealers challenged decisions of the Comptroller of the Currency allowing national banks to operate discount

---

[12] *See Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46 (1981) (open-end investment companies' challenge to Board regulation allowing bank holding companies to act as investment advisors to closed-end mutual funds); *United States Nat'l Bank v. Independent Ins. Agents of America*, 508 U.S. 439 (1993) (challenge to Comptroller ruling allowing banks located in small communities to sell insurance by mail to people outside such communities); *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (challenge to Comptroller ruling allowing banks to serve as agents in sale of annuities).

[13] The courts of appeals have routinely found standing for competitor challenges under *Clarke* and its predecessors. *E.g., UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 66 F.3d 621 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996) (private firm has standing as competitor to challenge Postal Service's operation of International Customized Mail system); *Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1995) (banks have standing to challenge NCUA approval of credit union expansion allegedly in violation of Section 109 membership limitations); *Securities Industry Ass'n v. Clarke*, 885 F.2d 1034 (2d Cir. 1989) (securities dealers have standing as competitors to challenge the Comptroller's decision to allow banks to sell mortgage pass-through certificates); *Board of Trade of Chicago v. SEC*, 883 F.2d 525 (7th Cir. 1989) (futures markets have standing as "rivals for investors' custom" to challenge the SEC authorization of new trading system); *DeLoss v. HUD*, 822 F.2d 1460 (8th Cir. 1987) (owners of rental property have standing as competitors to challenge HUD decision to subsidize housing project).

brokerage offices at places other than permissible bank branches. The securities dealers contended that the Comptroller's decisions violated the McFadden Act, which restricts certain national bank activities to authorized branch offices, and limits the geographical locations at which branches may be established. 479 U.S. at 392-93. Congress clearly did not pass the McFadden Act for the purpose of benefitting securities dealers, but the Court concluded that they had standing under the "zone of interests" test because they were "competitors who allege an injury that implicates the policies of the National Bank Act." *Id.* at 403. As NCUA concedes in its brief,

> [t]he commercial interest asserted by [securities dealers, who] compete with banks in providing discount brokerage services, was within the zone of interests of provisions of the National Bank Act limiting locations in which banks can have branches since the point of these provisions was, in part, to "limit[] the extent to which banks can engage in the discount brokerage business."

NCUA Br. 23. Likewise here, Respondents are within the zone of interests of provisions of the FCUA limiting the persons to whom credit unions may provide services as members, since the point of those provisions is, in part, to limit the extent to which credit unions can serve such persons as members.

Similarly in *ICI*, the Court held that securities dealers had standing to challenge decisions of the Comptroller allowing banks to provide certain pooled investment services to customers in alleged violation of the Glass-Steagall Act (part of the Banking Act of 1933). There was no pretense in *ICI* that the Glass-Steagall Act was adopted in order to protect the securities firms from competition with banks. On the contrary, the opinion is quite clear that the Act's purpose was

to protect the stability of the banks themselves and to protect customers by limiting the extent to which banks underwrite securities, a business Congress then believed to be risky and prone to conflicts of interest. This Court held that the securities dealers had standing to challenge the bank activities because Congress had "arguably legislated" against banks engaging in the particular activities constituting "the competition that the petitioners sought to challenge, and from which flowed their injury." 401 U.S. at 620. No more is required. As the *Clarke* Court noted in commenting on *ICI*:

> Justice Harlan, in dissent, complained that there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks. The Court did not take issue with this observation; it was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business.

479 U.S. at 398.

The analysis of standing here precisely follows the analysis in *ICI*. In the FCUA's common bond provision, Congress at least "arguably legislated" that occupationally defined federal credit unions must limit their services to members sharing a single common bond. We do not know Congress's complete or precise purposes for doing this, as the court of appeals found, Pet. App. 3a, 21a, and NCUA concedes. But even if its primary purpose were to strengthen credit unions themselves, and benefit their members, as in *ICI*, Respondents have standing because the action that Congress "arguably legislated" against is precisely what constitutes "the competition that [Respondents have] sought to challenge, and from which flowed their injury." 401 U.S. at 620.

NCUA ignores *ICI* in its discussion of standing, but it does argue that the competitor standing precedents are inapplicable because they concern limitations on growth aimed at restricting the size of competing firms, whereas the "'common' bond [restriction] . . . does not require that credit unions be small entities." NCUA Br. 25-26. This argument does not respond to anything that the court of appeals said, or to any pertinent issue. No one contends here that credit unions must be "small entities," any more than the plaintiffs in *ADAPSO, Arnold Tours, ICI,* and *Clarke* contended—or were required to contend, in order to establish their standing—that banks have to be "small entities." Neither this case, nor any of those cases, involves limitations on an institution's absolute size.[14] What they do involve is recognizing one financial institution's standing, under the "zone of interests" analysis, to challenge agency action permitting another type of financial institutions to expand beyond the limitations Congress imposed on it. The policing of these competitive boundaries is critically important in the financial industry, where Congress replaced free entry among all participants with a system of highly regulated and specialized institutions. Here, as in the prior cases, Respondents have a direct substantive interest in challenging regulatory action that breaches those boundaries in order to protect themselves from competition that Congress intended to preclude by making it unlawful.

For these reasons, NCUA has it exactly backwards when it argues, NCUA Br. 24, that Respondents' position here is contrary to *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991). In *Air Courier*,

---

[14] *See* 1933 Hearing at 15 (Bergengren testimony) ("Therefore, a credit union first, as I have said, is a bank which is organized within a specific group of people. That group may be quite large. The Telephone Workers Credit Union in Boston has 16,000 members. It is, however, confined to the employees of the New England Telephone & Telegraph Co.").

unions representing Postal Service employees sought to challenge the Postal Service's suspension of its monopoly over international express mail delivery because they believed that the statute threatened their jobs. The statute in question, like the statute here, defined operational limits on competition among competing firms in an industry. It was not, however, a labor relations measure. Thus the Court, specifically citing with continuing approval the "series of cases in which we have held that competitors of regulated entities have standing to challenge regulations," *id.* at 529, held that the labor union plaintiffs did not have standing *because they were employees rather than competitors:*

> The [statutes at issue] are competition statutes that regulate the conduct of competitors of the Postal Service. The postal employees for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers. Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury.

Id. at 528 n.5. In this case Respondents are unlike the inadequate employee challengers in *Air Courier* precisely because they *do have* the "competitive and direct injury" that justifies "competitors of regulated entities having standing to challenge regulations."

B. Standing Does Not Require an Explicit Statement by Congress That the Common Bond Restriction Was Enacted for the Benefit of Banks.

The general purpose of the Federal Credit Union Act is to provide for a system of credit unions that is federally chartered and regulated, just as the general purpose of the National Bank Act is to provide for a system of federally

chartered and regulated banks. Each of the two statutes, like any important federal enactment, is the result of a deliberative process involving the accommodation of a variety of judgments and interests. In each case, the statute reflects congressional intentions not only generally to foster the establishment and health of these financial institutions, but also to impose definite limits on their activities and organization. For example, the National Bank Act, designed to establish healthy and vigorous national banks across the country, at the same time limits the geographical expansion of individual banks (the McFadden Act) and their securities powers (the Glass Steagall Act). The Federal Credit Union Act's common bond requirement is similarly an explicit limitation on credit unions' license. NCUA has specifically described the common bond restriction to Congress as "our McFadden Act."[15]

NCUA contends that Respondents should not be allowed to challenge the Agency's actions allowing credit unions to breach the common bond limitation, even though doing so gives credit unions new advantages in competing with Respondents and plainly injures Respondents, because the overall purpose of the Act in general is to facilitate the development of credit unions, and the overall purpose of the common bond limitation was to channel credit union organization in a safe and effective way. That argument is wrong because it misstates the applicable legal principles; and it is wrong because NCUA oversimplifies and mischaracterizes the multiple considerations involved in the enactment of the Federal Credit Union Act.

As to the applicable legal principles: NCUA routinely misstates the requirements of the "zone of interests" analysis. That banks are "nowhere mentioned in Section 1759," NCUA

---

[15] *See* 1981 Hearings at 109. The full passage is quoted below at page 40.

Br. 18, is not important to the inquiry, or else the claims in *Clarke, ICI, Arnold Tours,* and *ADAPSO* would all have come out the other way. Similarly, the Endangered Species Act contains no reference to ranchers or others in their shoes, but they have standing to challenge agency actions going beyond the bounds of the statute. *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

NCUA also asserts that Respondents cannot have standing here because the legislative history of the FCUA does not "suggest that it was intended for the benefit of the banking industry." NCUA Br. 19. But this Court's jurisprudence has never required Congress to make a list, in the statute or legislative history, of all those it intends to benefit. Indeed, this Court in *Clarke* was at pains to point out that "in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400. And in *ICI,* the securities industry had standing to raise a Glass-Steagall challenge, even though Congress in passing that Act clearly viewed the securities business as the problem that warranted legislation, not the beneficiary of the legislation. Similarly, in *Arnold Tours v. Camp*, 400 U.S. 45 (1970), travel agents had standing to challenge the Comptroller's decision to allow banks to provide travel services to customers. In so holding, as the Court later noted in *Clarke*, "The Court found it of no moment that Congress never specifically focused on the interests of travel agents in enacting § 4 of the Bank Service Corporation Act." 479 U.S. at 396, n.10. The contrary idea advanced by NCUA, that the plaintiff's specific type of institution must be particularly mentioned in the legislative history, would lead to the absurd result that the most outrageous breaches of congressional purpose would be incontestable if Congress did not think it necessary to address them explicitly in the legislative process.

The FCUA is generally intended to foster the development of credit unions—but only up to a limit. Congress did not intend to foster any credit union operations, no matter how beneficial such operations might be to particular prospective credit union members or to the balance sheets of particular credit unions, in violation of that limit. As the statute establishes absolutely, Congress intended that the place for occupational federal credit unions in our financial system should not expand beyond the common bond limit—just as the place for national banks did not extend beyond the locations allowed by the McFadden Act, or the activities allowed by the Glass Steagall Act or other authorized powers.

Thus, the nature of the statute's absolute restrictions on credit unions' business itself shows that competitor institutions are at least "*arguably* within the zone of interests protected" by that restriction to justify standing here, just as in *ICI*, *Clarke*, *ADAPSO*, and *Arnold Tours*. *See, e.g., Bennett v. Spear*, 117 S. Ct. at 1168 (finding it "readily apparent" from the statute's face that one purpose of a provision requiring use of the best data available in implementation of the Endangered Species Act was to "avoid needless economic dislocation."). Under the principles laid down in these cases, the Court need look no further than the face of the common bond restriction to find standing here.

As to the legislative history: The history of the Federal Credit Union Act shows that the competitive interests of banks *were* among Congress's concerns when it enacted the Federal Credit Union Act.

During the early 1930's, in an effort to deal with the Depression, Congress refashioned the structure of the entire financial system by segmenting the industry into separate classes of institutions to serve different functions through the exercise of carefully limited powers. Securities firms, whose whole regulatory structure was revised in the Securities Act of 1933 and the Securities Exchange Act of 1934, were permitted

to underwrite and deal in corporate securities but were forbidden to take deposits, Pub. L. No. 66, 48 Stat. 189 (1933); commercial banks retained broad lending and deposit taking authority but were limited in the securities services they could offer to the public under the Banking Acts of 1933 and 1935, *id.*; Pub. L. No. 305, 49 Stat. 709 (1935); federal savings associations were accorded only limited commercial lending powers, while significant tax incentives were applied to encourage mortgage loans under the Home Owners' Loan Act, 12 U.S.C. § 1464 (c)(2)(A), 48 Stat. 132 (1933); credit unions were authorized to provide limited services to a narrow membership, and forbidden to do business with the public at large, under both the District of Columbia Credit Union Act of 1932, and in the FCUA of 1934.

Congressional concerns that chartering credit unions could inflict an unwanted competitive injury on the commercial banking industry are reflected as early as the hearings on the District of Columbia Credit Union Act of 1932, the forerunner of the FCUA. Bankers in the District of Columbia testified that the proposed credit unions would be a substantial source of competition, and argued for amendments to limit the competitive advantages that credit unions would enjoy. *Hearings Before the Senate Committee on the District of Columbia on S. 1153, a Bill to Provide for the Incorporation of Credit Unions in the District of Columbia*, 72d Cong., 1st Sess. 25-38 (1932). There was significant concern, in view of the weakened state of the banking industry, about the wisdom of too strong a wave of competition from credit unions. As Senator Kean observed, for example, "I agree with the President that we ought to go very slowly with anything that will interfere with the banks at the present time." *Id.* at 31. The resulting bill included not only an analogue to the 1934 Act's common bond limitation (which was included even in the first proposal), but in addition other changes that were directly responsive to these competitive

concerns. *See* 75 Cong. Rec. 5738 (remarks of Sen. Dickinson); 5964 (Senators Dickinson and Blaine); 7889 (voting on amendments) (1932).

With this background, it is not surprising that Mr. Bergengren, began his presentation at the 1933 hearings by admitting that a credit union "is a bank" but immediately diminishing the concern of unwanted competition by emphasizing "in the first place" the common bond limitation: "[E]very credit union is organized within a limited and given group of people. And it may have to do only with the members of that group." 1933 Hearing at 15. The importance of this limitation, as we discuss more fully below in connection with the merits, was echoed repeatedly throughout the legislative history. *See infra* at 43-47. Moreover, as Congress's deliberations proceeded, the problem of competitive injury to the remaining banks, and banks' concerns about credit unions, were raised and addressed on more than one occasion. *See, e.g.*, 1933 Hearing at 20 (Sen. Goldsborough's concern about "opposition on the part of commercial banks"); 78 Cong. Rec. 12224 (1934) (Rep. Luce addressing whether credit unions would "interfere with" banks). The concessions to banks' competitive concerns that were made during the debates over the District of Columbia statute in 1932 were all adopted as part of the nationwide statute, as was the common bond limitation.[16]

In short, while we do not contend that concern for banks' competitive interests was Congress's main concern, there is simply no basis for NCUA's assertion that Congress did not have banks' competitive stake in mind. It was not necessary to *debate* these competitive issues in connection with the

---

[16] *Compare* Pub. L. No. 467 §§ 7(6) and (8), 9, 48 Stat. 1216 (1934) (provisions in FCUA) *with* Pub. L. No. 190, 47 Stat. 326 (identical provisions in D.C. Act). The FCUA was modeled on the D.C. Credit Union Act. 1933 Hearing at 29; 78 Cong. Rec. 7259 (remarks of Sen. Sheppard).

FCUA in 1934, because they had already been addressed in the 1932 District of Columbia legislation, and the changes made in that legislation were carried forward to the nationwide statute; in addition, the credit union proponents already favored the common bond limitation for reasons of their own.

As this Court's decisions repeatedly emphasize, major legislative acts are invariably the product of multiple purposes, concerns, and compromises. *See, e.g. Bennett*, 117 S. Ct. at 1168 (finding the provision at issue to have not only one "obvious purpose," but also "another objective," reflecting countervailing concerns, which supported plaintiffs' standing); *Clarke*, 479 U.S. 388, 410-417 (1987) (Stevens, J., concurring in part and concurring in the judgment) (competitors were within the zone of interest protected by the McFadden Act, since the Act represented a "compromise" between different interests); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."). Thus, while one impetus for the common bond provision may have been to strengthen credit union organizations themselves, the only fair reading of the purposes "implicit in the statute," and its legislative history, *Clarke*, 479 U.S. at 399, is that the potentially competitive relationship between credit unions and existing banking institutions was a companion concern in Congress's legislative process as well. That is more than sufficient to establish that plaintiffs are "arguably within the zone,"[17] under the APA's "generous review provisions."[18]

---

[17] *ADAPSO*, 397 U.S. at 153, *quoted in Bennett v. Spear*, 117 S.Ct. at 1161; *Clarke*, 479 U.S. at 396 .

[18] *ADAPSO*, 397 U.S. at 156 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)), *quoted in Bennett v. Spear*, 117 S. Ct. at 1161;

(continued...)

II. SECTION 109 LIMITS MEMBERSHIP IN EACH OCCUPATIONAL FEDERAL CREDIT UNION TO A SINGLE COMMON BOND OF OCCUPATION.

The court of appeals below analyzed the common bond requirement under the *Chevron* standards, and concluded that Section 109 of the FCUA requires that all members of an occupational credit union share a single common bond. The Sixth Circuit reached the same conclusion. *First City Bank v. NCUA*, 111 F.3d 433 (1997). We show below that this conclusion fully conforms with *Chevron* and its progeny, and was required here by the language and structure, purpose, and legislative history of the Act.

A. An Agency's Interpretation of a Statute Must Conform To Congress's Dictate.

The starting point for analyzing an agency's interpretation of a statutory provision is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Determining whether Congress has directly spoken to an issue involves the "traditional tools of statutory construction." *Id.* at 843 n.9: The court examines the language of the statute at issue, as well as the structure of the Act, and its legislative history. *See, e.g., Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (relying on plain language, structure, and legislative history of statute); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987) (relying on words, structure, and legislative history of statute). As the Court explained in *Dole v. United Steel*

---

[18] (...continued)
Clarke, 479 U.S. at 395.

Workers of America, "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 494 U.S. 26, 35 (1990) (internal quotations omitted).

There are circumstances in which Congress has not directly spoken to an issue by expressly delegating to an agency authority to fill in a gap in a statute, or by implicitly delegating authority to the agency through silence or its use of ambiguous terms (*e.g.*, "public convenience and necessity"). *Chevron*, 467 U.S. at 843-44. In those circumstances, the court need only determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. But this deference to the agency interpretation is appropriate only if the court first concludes that Congress has not spoken to the issue. *See Dimension Fin. Corp.*, 474 U.S. at 374 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."); *Dole*, 494 U.S. at 42-43 ("Because we find that the statute, as a whole, clearly expresses Congress's intention, we decline to defer the OMB's interpretation.").

In this instance, NCUA argues that its interpretation of Section 109 is "reasonable" and promotes Congress's general intent to foster credit unions, and that a contrary reading of the statute is "anachronistic" and does not take into account "[m]odern technology and the widespread availability of credit information." NCUA Br. 40. Such arguments, even if they were defensible on policy grounds, are relevant only if the Court first concludes that Congress has not spoken to the issue. If, as Respondents maintain, and two courts of appeal have held, Congress *has* directly spoken to the issue, then NCUA cannot interpret away what it thinks are "anachronistic" limitations. An agency "has no power to correct flaws that it perceives in the statute it is empowered to administer." *Dimension Fin. Corp.*, 474 U.S. at 374.

Congress did not delegate to NCUA authority to fill in a gap in the statute in this case. The relevant part of Section 109 is a specific limit on the authority of NCUA. The initial clause generally allows NCUA to define proper membership in a federal credit union through rules and regulations. The "except" clause at issue here comes next, and specifically restricts NCUA's rulemaking discretion as follows:

> . . . *except that* Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

(emphasis added). These words have meaning. Indeed, for fifty years NCUA and its four predecessors adhered to the understanding that, *as a matter of law*, this clause meant that all members of an occupational credit union must share a single common bond. A change in views may not be fatal in evaluating the reasonableness of an agency's present policy in implementing an ambiguous statute in the light of current needs under "step two" of *Chevron* if a Court has already found that a statute allows that interpretation. See *Smiley v. Citibank (South Dakota)*, 116 S. Ct. 1730, 1734 (1996). But a fifty-year interpretation by the agency and its predecessors, dating back to the time of enactment, that the provision has a single legal meaning is strong evidence that the provision does not contain the ambiguity now claimed by the agency. *See Dimension Fin. Corp.*, 474 U.S. at 371 n.5 (declining to credit agency claim of ambiguity in the face of prior agency interpretations that were expressed not as policy but as required by law in light of "the language of the Act and the legislative history of its passage.").[19]

---

[19] NCUA notes that a 1940 memorandum by the General Counsel of the Farm Credit Administration, a predecessor agency, stated that the common bond clause "does not by its own terms define itself with sufficient (continued...)

Now NCUA takes the position that the limiting clause was drafted in a way that makes it linguistically possible to read the words of the clause at issue, taken in isolation, to allow an occupational credit union to be chartered with an unlimited number of unrelated employer groups. NCUA does not contend that this latter view was actually conceived, much less desired, by Congress. Nor does NCUA seriously argue that Congress *intended* for the statute to contain ambiguity on this point (that is, the Agency does not contend that Congress's phrasing was artful ambiguity rather than inartful awkwardness), or that changed circumstances have created an ambiguity about how, for example, to apply the language in light of new technology. Rather, its argument in substance is that its favored reading of the statute is linguistically possible, and Congress's lack of drafting skill authorizes the Agency to choose whatever approach it likes.

That is not what *Chevron* and its progeny say. *Chevron* states that the interpretation of statutes is a search for Congress's intent. 467 U.S. at 842-43. ("If the intent of Congress is clear, that is the end of the matter . . . ."). Thus, this Court has repeatedly rejected agency interpretations, even though they were clever linguistic possibilities, when the Court has determined that Congress did not intend for the agency's approach to be within the range of permissible readings. *See, e.g., Dunn v. Commodity Futures Trading*

---

[19] (...continued)
particularity to facilitate its application in all of the situations in which its application may be necessary." NCUA Br. 32-33 n.13. That observation is neither surprising nor relevant. The General Counsel did *not* say that the clause was ambiguous in any respect that would allow a credit union to combine multiple unrelated common bonds. On the contrary, the memorandum concluded that the only possible interpretation of the statute required that the members of a credit union all "have *a* common occupation or *a* common employer, or are otherwise associated through some common interest or enterprise. . . ." FCA Gen. Counsel, Legal Op. No 754-A, at 4 (Sept. 24, 1940) (emphasis added).

Comm'n, 117 S. Ct. 913, 916 (1997) (rejecting agency reading of statute that "seems quite unnatural" in favor of a "more normal reading"); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (rejecting agency reading of statute based on alternative dictionary definition and noting that "[a]mbiguity is a creature not of definitional possibilities but of statutory context"); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 226 (1994) (rejecting agency's reading of statute and rejecting contention that courts must defer to agency's choice of alternative dictionary definitions).

In this case, Congress spoke specifically to the point that membership in an occupational credit union was to be limited by the common bond, and did not give NCUA any discretion to avoid that limitation. In *Chevron* terms, Congress spoke "directly . . . to the precise question at issue." 467 U.S. at 842. The limiting words must mean either (1) as the courts of appeal say, that all members of the credit union must share a single common bond, or (2) as NCUA says, that members of the credit union may be associated with unrelated groups, so long as the groups have separate common bonds for their separate constituents. If the statute means (1), then *Chevron* is clear that no amount of agency policy justification can authorize NCUA's approach. If the statute means (2), then no agency policy analysis is required in order to support that approval. We submit that it is obvious that Congress intended one meaning or the other: the statutory language may be awkward when analyzed long enough and hard enough with *The King's English* in hand, NCUA Br. 31 n.11, but there is no basis to conclude that Congress intended to be ambiguous on this point in order to authorize NCUA to choose any preferred policy. Using the "traditional tools of statutory construction"—including common sense—the evidence is overwhelming that Congress intended to require that the members of each credit union share a single unifying occupational bond, not separate or even antagonistic ones.

B. The Language, Structure, and Legislative History of the FCUA Confirm That Congress Intended Section 109 to Limit Occupational Credit Unions to a Single Common Bond of Occupation.

1. *Text of Section 109.*

The starting point is the language of the statute: ". . . Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The natural reading of this provision, giving meaning to all of its words, is that the membership of an occupational federal credit union, however many subgroups it may contain, is *limited*; the limit is that the members of the credit union must have "a"—*i.e.*, one—unifying "common bond." NCUA's approval of ATTF's expansions violates the statute because ATTF's members admittedly do not share "a" common bond.

This is not merely the natural reading of Congress's words, it is the only reading that recognizes the "common bond" requirement in occupational credit unions. NCUA's argument is that the statute authorizes it to charter conglomerate credit unions consisting of an unlimited number of separate employer groups (despite the use in the statute of the word "limited") that are unrelated, or even antagonistic, to one another so long as each group has its own distinctive common bond. Thus, under NCUA's theory, as it reluctantly admitted to the court of appeals,[20] Section 109 permits the Agency to charter any credit union to admit into membership every employee of every company in the United States.[21] But

---

[20] Tr. of Oral Hrg., Sept. 29, 1995 at 26-28.

[21] NCUA's regulations presently require that a credit union list the specific employers whose employees are to be included within the field of membership. That is, NCUA will not accept an application listing the

(continued...)

this means that the statute's reference to "a common bond" for occupational credit unions is meaningless; the statutory limitation on NCUA's chartering "occupational" credit unions is only that the members have (or had) a job of some kind, somewhere.[22] That is obviously wrong.[23]

The point is that Congress enacted the "common bond" provision as a statutory *limit* on the Agency's policy options. By misreading the statute to permit the chartering of wholly generic "occupational" credit unions open to all workers, NCUA has read "common bond" out of the statute. As the court of appeals has observed, "the term 'common bond' would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an

---

[21] (...continued)

prospective membership as "[e]mployees of . . . firms in Seattle" because it does not specifically identify each common bond. Rather, an application should state the "names of [every] firm" (*e.g.*, ABC Inc., DEF Inc., GHI Inc., etc.). Federal Credit Union Field of Membership and Chartering Policy, 58 Fed. Reg. 40,470, 40,473 (1993). The difference appears to be only a matter of formality, subject to change. Moreover, as NCUA's approval of ATTF's expansions reflects, ABC, Inc., DEF, Inc., and the rest do not need to be in the same industry or the same geographical area.

[22] Actually, NCUA regulations are looser. NCUA's view is that membership in an occupational credit union is open to anyone with a job at a firm included in the membership list, and anyone else in such person's family. *See* 59 Fed. Reg. 29,066, 29,079 (1994) (family members of those within common bond eligible for credit union membership). In fact, under NCUA's "once a member, always a member" policy, a credit union may allow an individual to remain a member of the credit union after leaving the field of membership. *See id.*

[23] NCUA advised the court of appeals that, as a matter of its present regulatory policy, it would not approve such a national credit union open to all comers. But that *policy* may of course change, just as NCUA's position on other matters has changed: Before 1982 NCUA would not have allowed ATTF to expand across 50 states with more than 150 wholly unrelated employer groups.

FCU." Pet. App. 7a. That is not a plausible interpretation of Congress's text or intent. *See First City Bank*, 111 F.3d at 439 ("[W]e simply cannot conceive, and no one has suggested, any statutory rationale for requiring the type of 'common bond' NCUA has invoked."). If NCUA believes that the statute "may be imperfect," it "has no power to correct flaws that it perceives in the statute," but instead must ask Congress to amend the statute. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

NCUA argues, NCUA Br. 34-35, that its interpretation is required because the statute uses "groups" in the plural, and in doing so it means to refer to multiple "groups" within one credit union. The court of appeals properly found this argument unpersuasive. NCUA has long taken the position—which respondents do not contest here—that different categories of employees of a single company, or the employees of a company and its subsidiaries may organize a single credit union *because they share a single common bond of occupation* even though they may be described as comprising several groups. NCUA, *Organizing a Federal Credit Union* 5-7 (Sept. 1972). The use of the plural "groups" means no more than that.[24]

---

[24] The same point is reflected in a statute addressing the organization of Indians in Alaska that contains phrasing similar to the FCUA, Pub. L. No. 538, 49 Stat. 1250 (1936). It provides:

> [*G*]*roups* of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes but *having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district*, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans. . . .

(emphasis added). ATTF cites this provision to support its position that different groups may have different common bonds, ATTF Br. 39, but it

(continued...)

The court of appeals below (as well as the Sixth Circuit) also concluded that NCUA's proposed "multiple bond" interpretation was not credible because it is contrary to the acknowledged meaning of the parallel clause concerning community credit unions. Pet. App. 8a-9a; *First City Bank*, 111 F.3d at 438. Section 109 allows only two types of federal credit unions—"common bond" credit unions based on occupation or association, and "community" credit unions based on geography. The statute defines these two types of credit unions in functionally parallel clauses, both using the plural word "groups." The reason NCUA's interpretation does not hold together is that it treats these parallel clauses, and the word "groups" in both of them, in contrary ways. The language is as follows:

> . . . Federal credit union membership shall be limited to [1] groups having a common bond of occupation or association, or to [2] groups within a well-defined neighborhood, community, or rural district.

NCUA concedes, as it must, that the community credit union clause does not allow adding one community after another into a single credit union. It admits that, even though the clause allows geographically defined credit unions to include plural "groups," all of the groups must share the same neighborhood, community, or rural district. 59 Fed. Reg. 29,066, 29,077 (1994) (community based credit union must be limited to "a single, geographically well-defined area where residents interact"); NCUA Br. 32. The correctness of this

---

[24] (...continued)
actually undermines NCUA's argument. Under that provision, as under the FCUA, there may be more than one "group" within an incorporated organization, but there must be exactly one "common bond." Two groups of Alaskan Indians without a single shared common bond cannot organize to adopt a single constitution, and two occupational groups without a single shared common bond cannot join to form a single credit union.

concession is obvious: If it were permissible for a community credit union to be composed of an unlimited number of disparate geographic units across the country, then the statutory limitation to neighborhoods, communities, and rural districts, would be read out of the statute.

As the "groups" in a community credit union must share one community, the "groups" in an occupational credit union must share one common bond of occupation. It is an elementary canon of construction, and the only sensible approach if one is trying to understand what Congress actually intended in this statute, to read the two functionally parallel clauses in the same way. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (same language must be "accorded a consistent meaning within the [same] section" of a statute). NCUA struggles heroically to escape the logic of the statute, pointing out that the "common bond credit union" clause uses the word "having" and is "participial" while the "community credit union" clause uses the word "within" and is "prepositional." None of this, as the courts of appeals determined, makes a difference. Both the "having a common bond" clause and the "within a well-defined . . . community" clause, as NCUA ultimately concedes, refer to the key word (in NCUA's view) "groups," and they both limit which "groups" may be joined together within a single credit union. The question here, under *Chevron*, is what Congress intended; and it is not sensible to believe that Congress thought these two parallel clauses had the fundamentally different meanings for which NCUA now contends.

NCUA's final argument is that Section 109 *must be* ambiguous in the *Chevron* sense because the parties disagree about its meaning, because the district court below had to be reversed by the court of appeals, and because there was a dissent in the Sixth Circuit. NCUA Br. 33. The argument has no merit. A federal agency cannot, by boldly adopting a

jurisdiction-enlarging interpretation of a statute, automatically render the statute "ambiguous" in *Chevron* terms and thereby make the agency's position self-fulfilling. Moreover, this Court has repeatedly concluded that Congress's intent is unambiguous despite disagreements by lower courts about a particular statutory provision. *See, e.g., United States v. LaBonte*, 117 S. Ct. 1673 (1997) (holding that statutory provision is unambiguous despite split in circuits on meaning of language); *Dunn v. Commodity Futures Trading Comm'n*, 117 S. Ct. 913 (1997) (same); *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) (same).[25]

2. *Relationship of Section 109 To Other Provisions of the FCUA.*

The reading of Section 109 endorsed by the courts of appeals—that the members of a credit union must share a single common bond—is confirmed by another provision of the statute, the emergency merger provision adopted in 1982, Section 205(h), 12 U.S.C. §1785(h). This provision allows for the emergency merger of an insured, failing credit union into a healthy credit union without regard to the fact that each credit union is formed around a different common bond. Congress enacted Section 205(h) in response to a specific need identified by NCUA, which asked Congress for limited relief precisely because Section 109 prohibited it from merging occupational credit unions in emergency situations unless the credit unions happened to share the same common bond (an

[25] *Smiley v. Citibank (South Dakota)*, 116 S. Ct. 1730 (1996), which NCUA cites, does not support its argument. The issue in *Smiley* was the interpretation of the word "interest" in the National Bank Act. The Court found that notoriously protean term ambiguous in the context in which it was used because, as elaborated in diverse opinions from state supreme courts, that legal term had carried many different meanings in its long history in the common law and in various statutory settings.

obviously unlikely circumstance). NCUA's present argument, that Section 109 freely allows conglomerate credit unions of disparate common bonds within any occupational credit union, is entirely inconsistent with what it told Congress about the need for Section 205(h) and, more importantly, with the congressional action in response.

In the late 1970's and early 1980's, many occupational credit unions were in financial distress because of declining employment at sponsoring firms and economic hard times. It is common for regulators of financial institutions to seek to minimize dislocations in such situations by arranging for mergers among institutions, with the expectation that consolidated entities can better respond to economic stress. NCUA found itself unable to do this, however, with respect to occupational credit unions organized for employees of unrelated companies: the credit unions could not be combined because the members of the two existing credit unions did not share a single common bond as the statute would require of the resulting merged entity.

Congress attempted to address this problem in the Depository Institutions Amendments of 1977, but was then not willing, even in emergency situations, to abandon the principle that each credit union be defined by and limited to a single common bond. On the contrary, as the House Banking Committee's Report reaffirmed, "[t]he concept around which [credit unions] are organized, *people of close common interests* joining together for the economic benefit of *that group of persons*, is a concept [the] Committee has supported over the years." H.R. Rep. No 23, 95th Cong. 1st Sess. 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 110 (emphasis added). However, Congress did permit a healthy credit union to come to the aid of a troubled one by purchasing its assets and liabilities, and enlarged credit union powers to provide for such transactions. *See* Pub. L. No. 22, § 303(e), 91 Stat. 49

(1977) (codified at 12 U.S.C. §1757(14)).[26] But credit unions were pointedly *not* allowed to combine their memberships. As the House Report explained: "Nothing in this provision shall be interpreted as a means for the merger of credit unions with dissimilar common bonds." H.R. Rep. No. 23, 12, 1977 U.S.C.C.A.N. at 116.

The 1977 medicine was not strong enough. NCUA's Chairman returned to Congress in 1981 to ask this time for authority to merge troubled credit unions into healthy ones—and specifically to allow limited relief from the common bond requirement for these transactions in order to allow the surviving credit union to add to its membership the workforce that defined the common bond of the disappearing institution. As Chairman Connell explained in the hearings:

> The [concern of NCUA], of course, is plant closings caused by obsolescence of much of our heavy industry. For example, there are some 160 credit unions affiliated with automobile plants. We are concerned because, as plant closings occur, our ability to merge credit unions who are undergoing that problem with other credit unions is made difficult by what is our McFadden Act. That is the common bond. *We can't combine credit unions with unlike fields of membership.*
>
> While we don't advocate retreating from the concept of a credit union common bond, we believe relaxation of that requirement for financially distressed institutions does warrant serious consideration. . . .

1981 Hearings at 109 (emphasis added).

---

[26] Congress enacted similar but more limited legislation, presently codified at 12 U.S.C. § 1757(13), in 1968. See *supra* at 5.

The result of this request was legislation authorizing emergency mergers without regard to the common bond requirement, in individual situations, if NCUA made specified findings regarding the existence of an insolvency emergency, absence of other alternatives, and benefit to the public interest.[27] The House and Senate Reports both stated that the legislation was intended specifically to relieve NCUA from the strictures of the common bond requirement in such consolidations so that the resulting entity would not merely be acquiring the existing assets of the failing credit union, but could also serve the membership of the acquired credit union (in addition to the acquiring credit union's existing membership).[28] Except in these limited emergency circumstances, the legislation did not authorize avoiding the common bond limitation.

---

[27] Section 205(h) provides:

> Notwithstanding any other provision of law, the Board may authorize a merger or consolidation of an insured credit union which is insolvent or is in danger of insolvency with any other insured credit union or may authorize an insured credit union to purchase any of the assets of, or assume any of the liabilities of, any other insured credit union which is insolvent or in danger of insolvency if the Board is satisfied that —
>
> (1) an emergency requiring expeditious action exists with respect to such other insured credit union;
>
> (2) other alternatives are not reasonably available; and
>
> (3) the public interest would be served by approval of such merger, consolidation, purchase, or assumption.

[28] *See* H.R. Rep. No. 272, 97th Cong., 1st Sess. 13-14 (1981) ("[T]he common bond concept is relaxed to permit not only the management of existing assets but also . . . the use of the acquiring credit union's resources to develop the field of membership to its full potential."); S. Rep. No. 536, 97th Cong., 2d Sess. 50-51 (1982) (new provision allows merger "of an insured credit union with another insured credit union without regard to the traditional common bond requirements of Section 109 of the Federal Credit Union Act . . . ."); *id.* at 8 (merger permitted by this section "without any restriction as to field of membership or geographic area").

NCUA's argument in this case, that the words of Section 109 have always authorized any occupational credit union to include an unlimited number of unrelated employer common bonds groups, is precisely the opposite of what it told Congress, and on which Congress acted, in adopting Sections 107(14) and 205(h). The argument that any occupational credit union can routinely be approved for multiple common bonds simply cannot be squared with Section 205(h)'s requirement that such multiple bond arrangements can only be approved in emergency circumstances, where no alternative exists, on the basis of specific findings by NCUA.

The enactment of Section 205(h) also answers the policy arguments NCUA advances in favor of its position. NCUA maintains that its policy is "a legitimate response to the volatile economic conditions of the late 1970s and early 1980s," NCUA Br. 40-41, that has "allowed credit unions to shield themselves from the economic consequences of wide-spread layoffs or plant closings of a particular employer. . . . Without the more expansive interpretation of the common bond provision many credit unions would have failed. . . . These effects would have been clearly inconsistent with the Congressional intent to make credit available to those with limited means." *Id.* at 40 (quoting *First City Bank*, 111 F.3d at 442 (Jones, J., dissenting)). NCUA's argument ignores the fact that Congress specifically addressed these very concerns in 1977 and 1982, and chose a different response than the one now endorsed by NCUA: Enacting Section 205(h) authorized NCUA to allow mergers of failing credit unions, resulting in multiple common bond groups in the surviving credit union, *but only in narrow circumstances required by emergency considerations on the basis of a specific NCUA determination that there was no alternative*. Congress did not authorize the casual formation of multiple common bond credit unions like

ATTF as a legitimate means to foster credit union growth in general.[29]

3. *Legislative History*.

Legislative history is one of the "traditional tools of statutory construction" appropriate for consideration in determining whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. In this case, the legislative history confirms that Congress did have such an intention. In every passage addressing the issue, the legislative history confirms that Congress intended that credit unions be limited to a single common bond of occupation.

Credit unions were still novel in the United States in the 1930's, and the 73d Congress that enacted the FCUA looked for understanding primarily from its own experience in enacting the legislation for District of Columbia credit unions in 1932 and the expertise of a few credit union experts, principally Roy F. Bergengren. Bergengren had long advocated that state-chartered credit unions be organized around a common bond[30] and, as NCUA has stated, Congress relied on Bergengren's descriptions of credit union practice

---

[29] NCUA's "hard times" argument is on its face incongruous. Times were even harder in the 1930's when Congress enacted the FCUA. But, as we discuss below in connection with the legislative history, the Congress that enacted the FCUA indicated plainly that it had in mind credit unions with a single common bond of occupation, not multiple bond credit unions.

[30] In 1924, Bergengren developed a model credit union act that included the following common bond provision: "'Credit union organizations shall be limited to groups (of both large and small membership) having a common bond of occupation, or association or to groups within a well-defined neighborhood, community or rural district.'" GAO study at 217. Bergengren was co-founder of CUNA (then known as Credit Union National Extension Bureau). J.C. Moody & G.C. Fite, *Credit Union Movement: Origins and Development, 1850 to 1980* at 82 (2d Ed. 1984).

and his recommendations regarding legislation.[31] Indeed, Congress was quite clear that it intended to authorize only credit unions that adhered to the existing model of "typical credit unions" as Bergengren described them, S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934), without "any new form of practice or procedure," 77 Cong. Rec. 3206 (1933) (remarks of Sen. Sheppard).

Bergengren testified during the legislative hearings on the FCUA that an occupational credit union was organized around a single common bond, not multiple bonds. Indeed, this was the first difference between a bank (which would serve all comers) and a credit union (which would serve only those within its common bond, and could do so on a more intimate basis). The credit union might have a large number of members, but they would all share one common bond:

> Mr. Bergengren: If I may I would like to explain to you very briefly just exactly what a credit union is.
>
> Senator Bankhead: We want that information.
>
> Mr. Bergengren: A credit union is a bank, but it is a peculiar sort of bank. Peculiar in the first place because every credit union is organized within a limited and given group of people. And it may have to do only with the members of that group. . . .

---

[31] *See, e.g.*, NCUA, *Studies in Federal Credit Union Chartering Policy* §II, at 13 (1979) (". . . Bergengren described to the legislators his understanding of credit union organization. It is safe to assume that these views were accepted by the Congress."). When Bergengren testified before the Senate Banking Committee, Senator Sheppard introduced Bergengren as the man "who has done more to promote the [credit union] movement than any other man in the United States," *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st 13 (1933).

> Therefore a credit union first, as I have said, is a bank which is organized within a specific group of people. That group may be quite large. The Telephone Workers Credit Union in Boston has 16,000 members. It is, however, confined to the employees of the New England Telephone & Telegraph Co.
>
> *****
>
> Senator Bankhead: Let us say, for instance, you go to Baltimore and you go into a certain kind of a store. Do you include just one store in that group?
>
> Mr. Bergengren: Yes. The organization of a group depends to a certain extent on geographical distribution. For instance, members of the union have to be close enough geographically so as to operate effectively.
>
> Senator Bankhead: Take the clerks in the stores. Who are eligible in the group if you organize one in Baltimore?
>
> Mr. Bergengren: Take, for instance, the Tennessee Coal, Iron & Railroad Co. in Birmingham, Ala. There we have the T.C.I. Credit Union.
>
> Senator Bankhead: And it is limited to a single employer?
>
> Mr. Bergengren: Yes.
>
> Senator Bankhead: The group, then, must be composed of people employed by the same company?
>
> Mr. Bergengren: Yes.

1933 Hearing at 15, 24.

This understanding was reiterated in the statement of

Senator Sheppard, the sponsor of the bill that became the Act:

> A credit union is a cooperative bank organized within and in each case limited to a specific group of people. . . . No one outside the specific group can have anything to do with the specific credit union.

77 Cong. Rec. 3206 (1933). A year later, as Congress continued to review the issue, the same point was repeated by Senator Sheppard: "Credit unions are organizations of working people which enable members of *a given group* to save money . . . which is loaned to *members of the individual group* . . . " 78 Cong. Rec. 7259 (1934) (emphasis added). The same limitations were emphasized in the Senate Report, describing the institutions to be chartered as consisting of "a cooperative society . . . limited in each case to the members of a specific group with a common bond of occupation or association. . . ." S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). Similar statements were made on the House side. *See e.g.*, H.R. Rep. No. 2021, 73d Cong., 2d Sess. 2 (1934) (credit unions provide "self-help among groups of wage workers or farmers having a community of interest").

This legislative history shows that Congress did have a specific understanding that, as the statutory language states, the occupational credit unions it was authorizing would each be limited under Section 109 to members joined by a specific common bond, not a conglomerate of unlimited and unrelated company groups. In fact, NCUA's own thorough survey of the legislative history, published in 1979, confirms that Congress intended to follow this established model described by Bergengren. NCUA, *Studies in Federal Credit Union Chartering Policy* § II, at 12 (1979). NCUA's survey concluded:

> It is apparent that Congress never lost sight of this critical common bond factor throughout its long history in the Act [and subsequently as the

> Act has been amended]. Congress appears not to have intended that the central characteristic of credit union organization, i.e., *the limited membership within a specified group of persons*, be changed.

Id. at 14 (emphasis added).

There is no contrary legislative history. Nowhere in the legislative history of the 1934 Act is there any reference to any credit union composed of unrelated groups of members, or even the theoretical possibility that such a credit union might be formed.[32] Nor is there any support in the legislative history for NCUA's policy argument that multiple bond credit unions are necessary in order to bring credit union services to employer groups that are too small to support a viable credit union by themselves, a "purpose" NCUA appears to have made up in 1983 to justify its new policy.[33] NCUA Br. 39-40; J.A. 44.[34] Indeed, the historical justification for the common

---

[32] ATTF—but not the Government—points to a statement in the House Report stating that "[m]embership in Federal credit unions is limited to groups having common bonds of occupation or association," H.R. Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934), and asserts that this passage indicates that a single credit union may include more than one common bond. Obviously it does not; the passage only refers to multiple credit unions (plural) as having *between them* multiple common bond groups.

[33] ATTF—but again not NCUA—earnestly argues that a passage in the House debates on the FCUA indicates that Congress "may" have intended multiple common bond credit union to exist because Representative Luce indicated that clerks in a business with only one or two employees could join a credit union. ATTF Br. 42. But the ATTF is trying to put this passage into a context it never had. Of course clerks in a small business may be members of a credit union with a *single* common bond among all members, such as a credit union associated with a clerk's union or a civic or religious association; alternatively they might join a "community" credit union. Representative Luce said no more than this.

[34] The substance of NCUA's argument appears to be that the purpose of

(continued...)

bond as a means of promoting financial stability in credit union is just the opposite. If the purpose of the "common bond" is to enable the credit union to "loan on character" because it would "'realistically operate with unity of purpose' and . . . managers would 'possess a common . . . occupation with the membership they serve,'" NCUA Br. 19 (citations omitted), that purpose would be undermined, not advanced, by admitting into the credit union countless unrelated groups who are unknown to each other and were selected to join precisely because they were unable to handle their own financial affairs. NCUA now argues that the common bond's purpose to "ensure that all members of a credit union 'are known by the officers and by each other'" is "anachronistic." Id. at 40, quoting in part Pet. App. 11a. But NCUA's policy views do not entitle it to overrule Congress's intent.

Faced with legislative history from the enactment of the FCUA that completely undermines its position, NCUA makes an extended argument that because Congress has not enacted a statute overruling the 1982 administrative approach at issue here, it has ratified NCUA's position as a *policy* matter. NCUA Br. 43-47. That argument is wrong. This Court has many times warned that legislation may fail to be enacted for many and uncertain reasons, so that "congressional silence lacks persuasive significance."[35] Even NCUA does not pretend to argue that recent inaction indicates in any way that the statute *as enacted* was intended by Congress to allow that

---

[34] (...continued)
the common bond limitation was to strengthen credit unions and thereby lead to their expansion, and that ignoring the common bond limitation fulfills this purpose even more by allowing further expansion.

[35] *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (internal quotations omitted). *See also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.").

policy. And on that question, which is the question before this Court, even the *post*-enactment history "directly addressing the precise question at issue" is uniformly against NCUA's interpretation. As already discussed above, for example, Congress explicitly stated in 1981 and 1982 that Section 109's common bond limitation made it necessary to enact a special provision, Section 205(h), in order to authorize NCUA to approve emergency mergers (in exceptional circumstances) between two credit unions that were sponsored by different employers. *See supra* at 41-42. Other explicit post-1934 statements by Congress are abundant and uniform in confirming its understanding of the Act to require occupational credit unions to be limited to a single group. *E.g.*, H.R. Rep. No. 1791, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S.C.C.A.N. 2172 ("Membership in a particular Federal credit union is limited to a group having a common bond of occupation, or association, or a group within a well-defined neighborhood, community, or rural district.")[36]; S. Rep. No. 814, 86th Cong., 1st Sess. at 1 (1959) *reprinted in* 1959 U.S.C.C.A.N. 2784 ("Federal credit unions are cooperative associations.... Membership is limited to a group of persons having a common bond of association, occupation, or residence.")[37]; S. Rep. No. 1265, 90th Cong., at 2 (1968) *reprinted in* 1968 U.S.C.C.A.N. at 2471 ("No

---

[36] This statement related to a law transferring administration of the FCUA from the Federal Deposit Insurance Corporation to the Federal Security Agency. Pub. L. No. 813, 62 Stat. 1091 (1948). The statement was included in a paragraph providing a general description of credit unions.

[37] This statement related to the Federal Credit Union Act of 1959, in which Congress made numerous changes to the FCUA. Congress revised Section 109 in order (1) to recognize that the Act would now be implemented by the Director of the Bureau of Federal Credit Unions, and (2) to provide for issuance of shares of a credit union in joint tenancy. Pub. L. No. 354, § 10, 73 Stat. 628 (1959). Congress left unchanged the language of the common bond requirement.

individual may belong to a credit union or borrow from a credit union unless he is within the common bond concept of that credit union. This concept is extremely meritorious and should be maintained.").[38]

For all of these reasons, the legislative history of Section 109 confirms what the statutory language itself says. The membership of an occupationally defined federal credit union must be limited based on a single common bond shared by all members. The law does not allow conglomerate "occupational" credit unions composed of an unlimited number of unrelated or even antagonistic employer groups, such as ATTF.

---

[38] This statement related to an amendment to the Act to allow credit unions to purchase notes held by liquidating credit unions. *See* 12 U.S.C. 1757(13). The Senate Report went on to say that, "[o]nce [a] note had been fully repaid to the purchasing credit union . . . that credit union could not extend additional financing to the borrower unless he was within the common bond of the purchasing credit union." S. Rep. No. 1265 (1968), *reprinted in* 1968 U.S.C.C.A.N. at 2471.

CONCLUSION

This Court should affirm the decisions of the court of appeals.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
MICHAEL S. HELFER
CHRISTOPHER R. LIPSETT
LEON B. GREENFIELD
DAVID H. TOPOL
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Of Counsel
JOHN J. GILL III
MICHAEL F. CROTTY
American Bankers Association
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5026

July 11, 1997